



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Border Maintenance Service, Inc.

File: B-261090; B-261091; B-261091.2

Date: May 24, 1995

Joan K. Fiorino, Esq., East & Barnhill, for the protester.

DIGEST

In determining not to release a procurement from the section 8(a) program so that a company whose 8(a) program term had expired could compete, the Small Business Administration complied with 13 C.F.R. § 124.309(d)(1) by making a program and business judgment regarding the company's business development needs.

DECISION

Border Maintenance Service, Inc. protests the Small Business Administration's (SBA) decision to retain the Kelly Air Force Base and the Fort Sam Houston custodial services contracts in the section 8(a) program and the Army's subsequent issuance of a competitive section 8(a) solicitation for the Fort Sam Houston requirement under request for proposals No. DAKF49-95-R-0002.

Border Maintenance holds the current contracts, which were awarded to it on a sole-source basis under the section 8(a) program. Border Maintenance's program term, see 13 C.F.R. § 124.110 (1995), expired on December 31, 1994. On March 6, Border Maintenance requested the SBA to release the following year's contracts for non-8(a) competition. SBA denied the request. Border Maintenance contends that in so doing SBA violated 13 C.F.R. § 124.309(d), entitled Release for non-8(a) competition, which in "limited instances" permits the SBA in the circumstances here to reject the procuring agency's offer to continue awarding through the section 8(a) program and to recommend that instead the procurement be a small business or small disadvantaged business set-aside.

The protester's position is based on 13 C.F.R. § 124.309(d)(1), which states that in deciding whether to reject the section 8(a) approach the SBA will balance the importance of the contract for the former section 8(a) participant's stability and business development needs against the needs of other program participants. The protester asserts that the SBA did not perform a proper balancing test in accordance with the SBA's Standard Operating Procedure (SOP), and did not otherwise comply with the provisions of the regulation itself.

First, we will not consider the assertion that the SBA did not follow its own SOP. SBA's SOPs represent internal policies and guidelines rather than regulations having the force and effect of law. Therefore, SBA's compliance or noncompliance with its SOPs is not a matter which our Office will review under our bid protest function, pursuant to which we determine whether there has been a violation of law or regulation. See A.R.E. Mfg. Co., Inc., B-218116, May 17, 1985, 85-1 CPD ¶ 564.

Second, we find no violation of the regulation itself. Border Maintenance asserts that the SBA balancing approach fell short of what the regulation envisions and that the SBA did not, as required by the regulation, effectively obtain the views of the procuring agencies or properly consider how the pool of similar types of contracts to be fulfilled through the section 8(a) program would be affected by granting the protester's request. It is clear, however, that the SBA, in noting the length of time Border Maintenance had been in the program and the more than \$33 million in contract support that the firm had received during that time, did consider the protester's business development needs and concluded that they did not warrant rejecting the section 8(a) approach. This is a program and business judgment necessarily within the broad discretion given to the SBA in connection with the section 8(a) program, and is consistent with the regulation that envisions only "limited instances" in which the SBA will find that a company that has completed its program term has remaining business development needs that outweigh the needs of remaining section 8(a) companies.

As for the challenge to the Fort Sam Houston solicitation, the protester asserts that the Army did not follow various regulatory provisions before determining that the section 8(a) approach was appropriate. There is no merit to this argument. Procuring agencies have broad discretion under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 and Supp. V. 1993) to determine whether to place a procurement in the section 8(a) program, Microform Inc., B-244881.2, July 10, 1992, 92-2 CPD ¶ 13; San Antonio Gen. Maint., Inc., B-240114, Oct. 24, 1990, 90-2 CPD ¶ 326, and the Army here did no more than exercise that discretion in deciding to continue to satisfy its custodial services needs through the program. No material violation of any regulation is apparent from the protester's submission.

The protest is dismissed.



Ronald Berger
Associate General Counsel